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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEX NAVARRO, Defendant and Appellant.	E048275 (Super.Ct.No. FWV803263) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Douglas M. Elwell and Arthur Harrison, Judges.* Affirmed as modified.

Cathryn E. Lintvedt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

* Judge Elwell took the plea; Judge Harrison denied the motion to withdraw the plea and presided over sentencing.

Defendant Alex Navarro pleaded guilty to attempted kidnapping and agreed to register as a sexual offender under Penal Code section 290. Defendant sought to withdraw his plea prior to sentencing on the ground that he was not advised that his registration as a sexual offender would be for his lifetime rather than for the period of his probation. The trial court denied his motion to withdraw his plea and his request for a certificate of probable cause. We granted defendant's writ of mandate and ordered that his certificate of probable cause be granted.

Defendant claims on appeal as follows:

1. Due process of law requires that defendant be allowed to withdraw his plea.

2. The trial court abused its discretion by denying his motion to withdraw his plea.

3. Probation condition 36, which forbids defendant from possessing "sexually explicit" movies or materials, should be modified, as it is unconstitutionally vague and overbroad.

We will modify probation condition 36 and will otherwise affirm the judgment.[1]

I

PROCEDURAL BACKGROUND

Defendant was charged by the San Bernardino County District Attorney's Office with attempted kidnapping (Pen. Code, §§ 664/207, subd. (a))[2] and misdemeanor

[1] Defendant has also filed a related petition for habeas corpus (case No. E050372), which we will resolve by separate order.

annoying and molestation of a child (§ 647.6, subd. (a)(1)). It was also alleged that the latter offense required registration as a sexual offender under section 290.

On January 6, 2009, defendant entered a plea of guilty to the attempted kidnapping. In exchange, the charge of misdemeanor molestation of a child was to be dismissed at sentencing. Included on the preprinted plea form was a requirement, as part of the plea agreement, that he register as a sexual offender under section 290 and "290(2)(D)(ii)," as will be discussed in more detail, *post*.

On March 6, 2009, defendant brought a motion to withdraw his guilty plea on the ground that he was never advised that the registration required under section 290 was for his lifetime. His motion was denied by the trial court on April 3, 2009.[3] Defendant was granted formal probation for three years and was ordered to serve one year in county jail. Defendant was also ordered to register as a sexual offender for the rest of his life.

On May 13, 2009, defendant filed his notice of appeal and requested from the trial court a certificate of probable cause on the ground that he did not understand that his guilty plea would require lifetime registration as a sexual offender. The trial court denied the certificate of probable cause on the ground that "[c]ertificate of [p]robable [c]ause is not a prerequisite to appeal of the denial of motion to withdraw plea, nor will such certificate be granted in this matter."

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] We note that the minute order for that date mischaracterizes defendant's motion as a motion for new trial, when it was clearly a motion to withdraw his plea.

On July 29, 2009, defendant filed a petition in this court requesting that this court grant a peremptory writ of mandate ordering that his certificate of probable cause be granted. The People agreed that the peremptory writ should issue. We found that the trial court erred by refusing to grant the certificate of probable cause. We ordered a peremptory writ of mandate issue directing the San Bernardino Superior Court to vacate its order denying the certificate of probable cause and enter a new order granting the certificate of probable cause.

II

FACTUAL BACKGROUND[4]

On December 15, 2008, in the afternoon around 2:30 p.m., Jane Doe I and Jane Doe II both took the bus home from school. They got off the bus near their homes with several friends. They stood near the bus stop talking. Defendant approached the group and asked for the time, and one of the boys in the group responded.

Defendant approached Doe I and asked her if she wanted a teddy bear he was holding in his hands. She said no, but Doe II agreed to take it. Defendant suddenly grabbed both of Doe I's arms. Doe I kicked defendant. She told defendant she had a black belt in karate and would beat him up. Doe I backed away, and defendant tried to grab her again. Both girls ran across the street. Defendant yelled to them, "Don't worry about it. I'll find out where you live and I'll rape you."

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[4] Since defendant pleaded guilty in this case, there was no trial and no preliminary hearing. Accordingly, we draw the factual background from the police reports, which defendant agreed below formed the factual basis of his plea.

Doe I ran into her house and told her father what had happened. Defendant was standing near her house, and her father confronted him. Defendant ran away, and Doe I's father chased him. Police arrived as Doe I's father apprehended defendant, and defendant was placed under arrest.

Several other witnesses spoke with police and recounted the same story as told by the girls as to the events at the bus stop.

Defendant spoke with police. He said he was selling magazines door to door when he encountered a group of kids, including two girls. He was carrying a teddy bear he had found and one of the girls in the group asked him for it. Defendant gave the teddy bear to the girl and walked away. Defendant then approached a group of males and asked for the time. As he was talking to the males, one of the girls kicked him on his right buttocks. She tried to kick him again in the groin area, but defendant was able to block the kick.

The girl told defendant that she knew martial arts and could beat him up. Defendant told her he also knew martial arts, and the two girls walked away to a nearby house. Defendant went to the house next door to sell magazine subscriptions. A man emerged from the home the two girls had entered. Defendant was scared of the man (who threatened to beat him up), so he ran away.

Defendant displayed signs and symptoms of being under the influence of a controlled substance when he was placed under arrest. A blood sample was taken, but the results are not included in the record.

III

ANALYSIS

Defendant makes two interrelated arguments. First, he contends the trial court abused its discretion by denying his motion to withdraw his guilty plea because he was never advised by the trial court at the time he entered his plea that he would be required to register as a sex offender for his lifetime. He also asserts the taking of his plea violated his due process rights because he was never informed by his attorney, the trial court, or the plea form that he was subject to lifetime registration, and therefore his plea was not entered into knowingly, intelligently, and voluntarily. We address the two arguments together.

A. *Additional Factual Background*

On the preprinted plea *Tahl*[5] waiver form, defendant was advised of and initialed the term stating that "IF I plead guilty to any sex crime covered by Penal Code Section 290, I will be required to register as a sex offender with the chief of police of the city in which I reside or the sheriff of the county if I reside in an unincorporated area." (Boldface omitted.) Also written into the agreement was that he was subject to register pursuant to "PC 290 Pursuant to 290(2)(D)(ii)."[6] He also agreed to waive his appellate rights as follows: "I waive and give up any right to appeal from any motion I may have

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[5] *In re Tahl* (1969) 1 Cal.3d 122.

[6] Former section 290, subdivision (a)(2)(E) has been renumbered as section 290.006. (Stats. 2007, c. 579, § 14, eff. Oct. 13, 2007.)

brought or could bring and from the conviction and judgment in my case since I am getting the benefit of my plea bargain."

At the hearing on the plea agreement on January 6, 2009, defendant agreed that he had signed the *Tahl* form and that he had gone over the plea with his attorney at the time. Defendant agreed that he had waived his "right to appeal from [his] conviction, from [his] sentence, and from the other matters governed by the plea bargain[.]" The trial court advised defendant "[t]hat under 292(D)(I)(I) . . . you're going to be registering." Defendant entered his guilty plea to attempted kidnapping.

On February 4, 2009, defendant appeared for sentencing in front of a new trial judge. His attorney advised the trial court that defendant wished to withdraw his plea. The trial court agreed to appoint new counsel for defendant.

Defendant filed a motion to withdraw his plea through his newly appointed counsel. The motion stated that the question to be resolved by the motion was "whether Defendant was advised he would be required to register as a sex offender for his entire life and had he known, he would not have entered into the plea bargain." Defendant submitted his own declaration, attesting "[t]hat my attorney did not fully explain all of the consequences of my plea including lifetime registration as a sex offender[.]" He also declared "[t]hat I was kind of coerced into entering into the plea."

At the hearing on the motion to withdraw the plea, counsel explained that defendant was young (19 years old) and had minimal contact with the criminal justice system. He wished to withdraw his plea because he did not know at the time he entered

into his plea that he would be subject to lifetime registration as a sexual offender; he believed it was only for the period of the probation. Counsel referred the new trial judge to the oral advisement of the prior trial judge at the time the plea was taken that merely advised him he was subject to the registration requirements of section "292 (d)(1)(1)." Counsel asserted that defendant would not have entered into the plea had he been properly advised.

The People responded that defendant was aware that he was subject to registration, since he signed the *Tahl* form that included an advisement under section 290. There was no "temporal" limitation on the agreement. Further, the People argued, "There is no requirement that he has to be advised of a lifetime requirement." The People argued the plea was knowingly and intelligently made.

The trial court then inquired, "You indicated there was a box checked regarding 290 registration?" The People referred the trial court to the preprinted plea form. The trial court stated, "I have to confess, I have not referred to the applicable 290 code sections, and an attempt[ed] kidnapping would not require that registration." The People clarified that it was part of the plea agreement that he register as a sexual offender. Further, under general law it was a lifetime requirement. The trial court ruled, "I'm going to deny the request to withdraw the plea. I think the appropriate waivers have been given. And advisals have been given, certainly been supported by the documentary evidence discussed here." Thereafter, the People clarified that the applicable code section that required defendant to register had been changed to section 290.006.

B. *Failure To Be Advised of Direct Consequences of Plea*[7]

"Under long and well-established principles, a trial court is obligated to advise a defendant of the direct consequences of a plea of guilty or no contest to a felony or misdemeanor before it takes the plea. [Citations.] This obligation includes the duty to advise of the requirement to register as a sex offender upon conviction of a statutorily enumerated offense. [Citations.] Failure to advise of the sex registration requirement is error. [Citation.]" (*People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481 (*Zaidi*).)

In *Zaidi*, the defendant was charged with three crimes, all requiring mandatory sexual offender registration. The defendant agreed to plead no contest to misdemeanor lewd conduct in a public place, which carried with it discretionary registration under section 290. (*Zaidi*, *supra*, 147 Cal.App.4th at p. 1474.) At the time the plea was taken, defendant was advised, "'Do you understand that the Court could also order that you register as a sexual offender pursuant to Penal Code section 290 if the Probation Department determines that is appropriate?'" (*Id.* at p. 1476.) At sentencing, the trial court imposed mandatory lifetime registration as a sexual offender. (*Id.* at p. 1478.)

The defendant then brought a motion to withdraw his plea (supported by a declaration from the defendant) on the ground he was never informed when he entered

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[7] Although defendant agreed in the plea agreement to waive his right to appeal, the People do not contend that defendant is barred from raising his claims on appeal. The argument that a plea (and thus the waiver) was not knowing, intelligent, and voluntary "will always remain open for appellate review . . . ." (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.) Since we must review defendant's claim to determine whether waiver appropriately attaches, and the People do not raise waiver, we will review defendant's claim.

his guilty plea that the sexual offender registration was for his lifetime. The defendant believed the registration was only for the term of his probationary sentence. Defendant declared that if he had been advised that he would be subject to the lifetime requirement, he would not have agreed to plead guilty. (*Zaidi, supra*, 147 Cal.App.4th at pp. 1479-1480.) The trial court denied the motion to withdraw the plea. (*Id.* at pp. 1480.)

On appeal, the court stated, "The issue before us is the requisite content of the advisement regarding sex registration as a direct consequence of a plea. Does a trial court satisfy its obligation by informing the defendant simply that he or she must register as a sex offender pursuant to section 290, or must it specify that the registration obligation is lifelong? We conclude the court must advise that the registration requirement will be for the duration of the defendant's life." (*Zaidi, supra,* 147 Cal.App.46th at p. 1481.) It concluded that the trial court erred by failing to advise the defendant of the lifetime requirement of sex offender registration. (*Id.* at p. 1487.)

In the instant case, the sexual offender registration was not mandatory for a conviction of attempted kidnapping. Rather, the agreement that defendant register as a sex offender was part of the plea and was pursuant to section 290.006. That section provides that a defendant is subject to lifetime registration under section 290 even if the offense of which he is convicted is not enumerated in section 290 "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.) In *People v. McClellan* (1993) 6 Cal.4th 367, the Supreme Court interpreted the obligation of the trial

court to inform the defendant of the lifetime registration when the offense falls not only under section 290, but also under "other statutory registration requirements . . . ." (*McClellan*, at p. 376, fn. 8.) Accordingly, as a direct consequence of being subject to registration under section 290 and 290.006, defendant would be subject to lifetime registration.

Based on the foregoing, we believe that defendant was not adequately advised as to the direct consequences of his plea, i.e. that he was agreeing to lifetime registration as a sexual offender. The plea form itself did not include an advisement that registration under section 290 was for life. The only advisement was, "IF I plead guilty to any sex crime covered by Penal Code Section 290, I will be required to register as a sex offender with the chief of police of the city in which I reside or the sheriff of the county if I reside in an unincorporated area." (Boldface omitted.) Further, written on the form was the requirement that defendant "Register per PC 290 Pursuant to 290 (2)(D)(ii)." Based on this documentation alone, the standard advisement was not even applicable to defendant, who was pleading to a crime that did not qualify under section 290. Further, section 290.006 had replaced section 290, subdivision (2)(D)(ii) prior to the plea.

Regardless, in *Zaidi* the court found that an "abstract statutory reference" does not "inform the defendant of registration's most dire element." (*People v. Zaidi, supra*, 147 Cal.App.4th at p. 1484.) The trial court's sole statement to defendant at the time the plea was taken was that he was subject to registration under section "292 (D)(I)(I)." The trial

court erred by failing to advise defendant that by pleading guilty he would be subject to lifetime registration.

Defendant also claims that he did not knowingly and intelligently enter into the plea agreement because he was not aware of the requirement that he register as a sexual offender for life in violation of his due process rights. However, failing to advise a defendant of a direct consequence of a pending conviction is a violation of a judicially mandated rule of criminal procedure. It does not establish a constitutional violation. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

Moreover, defendant has not provided the necessary evidentiary support on appeal that he did not knowingly or intelligently enter into the plea agreement. Sex offender registration was part of the negotiated plea. Hence, defendant was clearly advised that he was subject to at least some period of sex offender registration. However, the record does not establish whether his counsel advised him that this was a lifetime registration requirement during negotiation of the plea. Defendant's self-serving declaration presented in the trial court cannot support such a finding. Defendant did not present a declaration from counsel below with his motion to withdraw the plea that he did not advise defendant of the lifetime requirement. Hence, in this appeal, defendant has only established that the trial court erred by failing to advise him of the direct consequence of the plea, a claim subject to a prejudice analysis, as discussed, *post*.

When the trial court fails to adequately advise the defendant of the direct consequences of his plea, to establish prejudice, defendant must demonstrate it is

reasonably probable he would not have entered his admission or plea if he had been properly advised. (*In re Moser* (1993) 6 Cal.4th 342, 352; *People v. Walker, supra*, 54 Cal.3d at p. 1023.) The *Zaidi* court also noted that the standard for assessing prejudice was "'"if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement. [Citations.]"' [Citation.]" (*Zaidi, supra,* 147 Cal.App.4th at p. 1488.) The *Zaidi* court found prejudice first based on the fact that the defendant had immediately brought a motion to withdraw his plea and had included a declaration that he understood the sexual offender registration would last the probationary period; had he known it was lifetime registration, he would not have entered his plea. (*Id*. at pp. 1488-1489.) Further, there was no evidence presented to rebut the defendant's declaration. The opposition to the motion to withdraw the plea did not include a declaration or other evidence that showed that the defendant had been advised that his registration would be for his lifetime. Further, hearings on the registration requirement never included a statement that it would be lifetime registration. (*Id.* at p. 1489.) Additionally, the probation forms and the trial court's sentence implied that registration would only last the length of probation. The *Zaidi* court concluded, "A lay defendant new to the criminal justice system could understandably infer from the context in which the probation department and court enunciated the registration requirement that registration was a condition of probation and that he would be bound by the requirement only for the length of his probation." (*Id.* at p. 1490.)

The *Zaidi* court concluded, "In light of (1) defendant's prompt effort to withdraw his plea on the grounds of lack of advisement, accompanied by his specific declaration that he would not have entered a plea had he known of the lifetime registration requirement; (2) the format of the oral sentencing and written probation forms that misleadingly suggested that the registration requirement was for the duration of probation only; and (3) the absence of evidence that defendant was made aware that registration would be for life, we conclude that defendant met his burden of establishing prejudice from the court's failure to advise that a consequence of his no contest plea would be lifetime registration as a sex offender. Under the totality of these circumstances, the denial of his motion to withdraw his plea was an abuse of discretion. [Citation.]" (*Zaidi, supra,* 147 Cal.App.4th 1470.)

In *People v. McClellan, supra,* 6 Cal.4th at p. 378, the Supreme Court found that the defendant had failed to show prejudice due to the trial court's failure to inform him of the obligation to register as a sex offender for life. In *McClellan*, the defendant did not assert that he wanted to withdraw his plea in the lower court and raised the issue for the first time on appeal. The only evidence that the defendant would have withdrawn his plea was his assertion on appeal. The *McClellan* court concluded, "Although defendant alleges that had he properly been advised, he would not have entered his plea of guilty, there is nothing in the record on appeal to support this contention." (*Ibid.*; see also *People v. Miralrio* (2008) 167 Cal.App.4th 448, 463 ["it makes sense to require the

defendant to show prejudice, because the defendant is the only one who knows whether he would have accepted the plea bargain absent the misadvisement"].)

Here, there is nothing in the appellate record to support defendant's assertion that he would not have accepted the plea had he been made aware of the lifetime registration. His declaration was unlike the one filed in *Zaidi*. Defendant declared that he was not advised of the consequences of his plea, including lifetime registration as a sex offender. However, he did not state that he would have not accepted the plea had been so advised. Moreover, given the circumstances of the plea, it is unlikely that he would have rejected the plea. If convicted of the section 647.6, subdivision (a)(1) offense, he would have been subject to mandatory lifetime registration. (§ 290, subd. (c).) Further, if convicted of both offenses, he faced up to five years in prison as opposed to three years' probation and a jail sentence. (See §§ 208, 647.6, subd. (a)(1), 664, subd. (a).) The evidence in the appellate record does not establish prejudice.

C. *Motion To Withdraw Plea*

Moreover, we find that the trial court did not abuse its discretion by denying defendant's motion to withdraw the plea. Section 1018 provides in pertinent part: "On application of the defendant at any time before judgment . . . , the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include

inadvertence, fraud or duress. [Citations.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) "The general rule is that the burden of proof necessary to establish good cause in a motion to withdraw a guilty plea is by clear and convincing evidence. [Citations.]" (*Id.* at p. 1207.)

We review an order denying a motion to withdraw a guilty plea for an abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) If substantial evidence supports the trial court's order denying a motion to withdraw a guilty plea, that decision must be upheld on appeal. (*Ibid.*; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.) We adopt the trial court's factual findings to the extent they are supported by substantial evidence. (*Fairbank,* at p. 1254.) Thus, a plea "resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

As set forth, *ante*, the evidence before the court at the time of the motion to withdraw the plea did not establish that defendant would not have accepted the plea had he been advised he was subject to lifetime registration. We are bound by the appellate record, which does not support by objective evidence that defendant suffered prejudice. The trial court did not abuse its vast discretion by denying defendant's motion to withdraw his plea.

Defendant claims that his counsel represented that defendant would have withdrawn his plea and had an ethical obligation to not make such a false statement. However, even the points and authorities provided by counsel are not objective evidence

that defendant would have not accepted the guilty plea. The motion merely stated, "Within the meaning of above, the question is whether Defendant was advised he would be required to register as a sex offender for his entire life and had he known, he would not have entered into the plea bargain." Even counsel did not aver that defendant had advised him that he would not have accepted the plea; his argument at the hearing did not establish that defendant had advised him he would not have accepted the plea. Counsel's conclusory warranty that defendant wished to withdraw his plea is not enough to show a legal basis for withdrawal of the plea. (See *People v. Urfer* (1979) 94 Cal.App.3d 887, 892.)

Defendant additionally claims that if this court concludes that the declaration provided by counsel in the trial court was not sufficient to show prejudice, he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, the defendant "must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937, citing, among others, *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

As noted by the People, counsel could not put words in defendant's mouth. This court cannot assess whether counsel was ineffective on the record before us because there

is no objective evidence that defendant in fact advised counsel he would not have pleaded guilty (thereby proceeding to trial facing a possible five-year sentence and lifetime registration for the section 647.6 offense) given the circumstances in this case. Defendant received a very generous sentence. It is entirely possible that defendant never advised trial counsel that he would not have accepted the plea had he known about the lifetime registration. Defendant may well have chosen to take the plea at the time it was negotiated, being aware of the consequences if he did not. Further, although he sought to withdraw the plea on the ground that, if adequately informed of the lifetime registration by counsel at the time the plea was negotiated he would not have accepted the plea, it was not a valid ground for withdrawal. Although it is a reasonable inference from the record that defendant, since he brought the motion to withdraw the plea, would not have accepted the plea had he been so advised, we are bound by the appellate record, which does not establish that defendant would not have accepted the plea had he been advised he was subject to lifetime registration.

Based on the foregoing, although defendant was not properly advised by the trial court of the direct consequences of his plea, we cannot find that defendant was prejudiced, as there was no objective evidence in the appellate record that defendant would not have accepted the plea agreement had he been fully advised. Hence, we reject that defendant is entitled to remand to withdraw his plea because it was not entered into knowingly or intelligently or that the trial court abused its discretion by denying his motion to withdraw the plea.

IV

PROBATION CONDITION NOT TO POSSESS SEXUALLY EXPLICIT MATERIALS

Defendant also contends that probation condition 36 is unconstitutionally vague and overbroad. That probation condition provides: "Do not own, use, or possess any form of sexually explicit movies, videos, material, or devices unless recommended by a therapist and approved by the probation officer. Do not frequent any establishment where such items are primary items viewed, sold at such establishment and do not utilize any sexually oriented telephone services." He seeks to have this court amend the probation condition to include the following language: "Sexually explicit is defined as X-rated movies and items classified as pornography. Artistic and/or instructional material, such as R-rated movies, general interest magazines and textbooks are not considered sexually explicit." (Italics omitted.)

At the time of sentencing, defendant objected to this probation condition, arguing it was "somewhat vague . . . ." The trial court responded, "I think R-rated movies are permissible. X-rated movies are not. Other items that would classify as pornography are inappropriate, so I'm going to leave it intact."

"[T]he void for vagueness doctrine applies to conditions of probation." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324.) A vagueness challenge is based on the "due process concept of 'fair warning.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Therefore, a probation condition "'must be sufficiently precise for the probationer to

know what is required of him, and for the court to determine whether the condition has been violated[]' . . . ." (*Ibid*.)

Here, we agree with defendant that the probation condition is vague, as it does not include a definition of "sexually explicit material." Although defendant was advised what the trial court considered sexually explicit material at the time of sentencing, it does not inform subsequent trial courts or probation officers of precisely what constitutes a violation. Defendant's challenged probation condition can easily be remedied on appeal by modification of the condition. (See, e.g., *In re Sheena K., supra,* 40 Cal.4th at p. 888.) We therefore order that the following language be added to the probation condition: "'Sexually explicit' is defined as X-rated movies and items classified as pornography."

Defendant additionally contends the probation condition should be modified to exclude artistic and instructional material in order to avoid being unconstitutionally overbroad. "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K., supra,* 40 Cal.4th at p. 890.) Possession of obscene material is protected by the First and Fourteenth Amendments. (*Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].) We believe the condition as modified above is not overbroad. To include all of the exclusions to the above condition would present an onerous task. The condition as modified is sufficiently precise for defendant to know what is required of him, is sufficient for future trial courts to determine whether the condition has been violated, and

is closely tailored to those limitations on pornography to meet the purpose of the condition. Defendant can seek approval from the probation department for artistic and instructional materials.

IV

DISPOSITION

The judgment is affirmed. Probation condition 36 is modified to add the following language: "'Sexually explicit' is defined as X-rated movies and items classified as pornography."

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.